Supreme Court, U.S.
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No. 91-1584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

DID THE BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI ADOPT AND APPLY THE INCORRECT DEFINITION OF "BONA FIDE DISPUTE" AS USED IN SECTION 303 OF THE BANKRUPTCY CODE AND AS A RESULT WRONGFULLY GRANT RESPONDENTS' PETITION FOR INVOLUNTARY BANKRUPTCY?

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I. Introduction.

Congress amended Section 303 of the Bankruptcy Code in 1984 to give greater protection to debtors from the strong arm tactics of coercive creditors. This Court now is presented with an opportunity to give life to the legislative intent behind these amendments by providing a definitive interpretation of the phrase "Bona Fide Dispute" as used in Section 303.

Respondents' Brief in Opposition contains two arguments - that the Circuits agree on the proper definition of "bona fide dispute" and that the Eighth Circuit correctly applied this definition. As will be shown below, neither of these assertions is persuasive.

II. The Proper Definition of Bona Fide Dispute is an Issue Ripe for a Decision By This Court.

> "What's in a name?" - William Shakespeare, Romeo and Juliet, Act I, Scene 5, Line 35.

Numerous definitions of "bona fide dispute" have been enunciated in various jurisdictions.[1] Even among the several circuits that have professed to have adopted the standard put forth in In re Busick, 831 F. 2d 745 (7th Cir. 1987), the enunciation of what the Busick definition is varies.

The Seventh Circuit, in Busick, adopting the standard enunciated in In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986), permitted

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[1] Indeed, the reputable treatise on the law of bankruptcy, Colliers on Bankruptcy, has called for a definitive interpretation of the phrase. "Several courts formulated differing standards for determining what is a debt in a bona fide dispute. These decisions will provide other courts and practitioners with insight to the problems prior to the time that all courts of appeal or the United States Supreme Court give a definitive interpretation." 2 Colliers on Bankruptcy, para. 303.08, p. 303-39.

the bankruptcy court to determine if a dispute existed but prohibited the court from inquiring into the outcome of the dispute. Busick, 831 F.2d at 750.

The Third Circuit, in B.D.W. Associates Inc. v. Busy Beaver Building Centers, Inc., 865 F. 2d 65, 66-67 (3rd Cir. 1989), professed to have adopted the "Busick" definition, yet it required a debtor to raise substantial factual and legal questions to preclude an involuntary bankruptcy.

Now, the Eighth Circuit, also professing to have adopted the Busick standard, has stated that the bankruptcy court may address the legal merits of the dispute and assess the credibility of witnesses to determine the factual merits of the dispute. In re Rimell, 946 F.2d 1363, 1365 (8th Cir. 1991); App. to Pet. at A-74. This standard is in complete contradiction with the standard enunciated in Busick. The Eighth Circuit's standard, whet-

her it be called the "Busick" standard or not, calls for an assessment of the merits of the dispute, not merely whether a bona fide dispute exists.

All three of the aforementioned courts call their definition of "bona fide dispute" the "Busick" standard, but each of their definitions of the "Busick" standard is clearly different. You can call it a duck, but if it wags its tail and barks, it's not a duck.

III. The Eight Circuit Has Adopted and the Bankruptcy Court Applied an Improper Standard for Determining Whether a Bona Fide Dispute Exists.

The Eighth Circuit in this case has adopted a definition of "bona fide dispute" that allows the trial court to examine the merits of an alleged debtor's defense to a debt. This includes allowing the trial court to assess "witnesses' credibilities and other

factual considerations."[2] Rimell, 946 F.2d 1365; App. to Pet. at A-74.

The Bankruptcy Court below, did just that when it apparently doubted Mr. Rimell's testimony and other evidence and determined

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[2] Respondents' apparently believe that witness credibility is an issue as they point to Petitioners' recent indictment as if it proved their case. This information is, of course, irrelevant, highly prejudicial, inadmissible and not in the record below. In return, Petitioners might point out that there is presently before the District Court for the Eastern District of Missouri a Motion to Quash this indictment based on the U.S. Attorney's alleged misconduct. Recently, several St. Louis newspapers have published articles pointing out that the U.S. Attorney for the Eastern District of Missouri whose department has instituted the prosecution against Petitioners was a lead player in instituting the present involuntary bankruptcy when he was a partner with present counsel for Respondent Mark Twain Bank. These media reports indicate that the U.S. Attorney has been accused of instigating the federal prosecution against Petitioners because of a personal vendetta he has against them arising out of the present bankruptcy situation. Could Senator Baccus have understood the lengths to which some creditors are willing to go to harass a debtor? Could this be why he proposed his amendments to Section 303 of the Bankruptcy Code?

that the evidence presented did not "prove . . . the existence of an agreement to renew or modify the terms of the loans. . . ." App. to Pet. at A-50 - A-51. The court thus resolved Petitioners' bona fide dispute.

Respondents contend that the Bankruptcy Court below applied the proper definition of "bona fide dispute" to the facts of this case. They dismiss alleged debtors' defenses on the debts as "frivolous," suggesting that an "objective person would conclude that any . . . 'oral agreement' to extend the terms of the loans was a figment of the [Petitioners'] fertile imaginations [sic]." Respondents' Brief in Opposition at 11. Yet, Respondents could not convince seemingly "objective" state judges to grant them summary judgment on these debts.

Respondents attempt to blame their inability to obtain summary judgment on the "vagaries of Missouri trial practice." Resp-

ondents' Brief in Opposition at 7. The fact is that the standard for summary judgment in Missouri is the same as that in federal court and the same as that in probably every other state in the union. The moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 74.04, Missouri Rules of Civil Procedure.

This is the same standard that was utilized by the District of Colorado, in In re Stroop, 51 B.R. 210 (D. Col. 1985), to determine if a bona fide dispute existed. This is the same standard that the Eastern District of Michigan, in Lough, found to be too hard on the debtor. Thus, the court in Lough modified the Stroop standard in the debtor's favor. The Bankruptcy Court below and the Eighth Circuit have professed to have adopted the Lough standard. Thus, they have adopted

a standard easier for the debtor to pass than the summary judgment test. It follows direct logic then that since Petitioners passed the summary judgment test in state court several times they easily should have passed the bona fide dispute test in bankruptcy court.

IV. Misstatements of Fact in Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Respondents' Brief in Opposition contains several factual inaccuracies which require a response.

1. Contrary to Respondents' implications, Mr. and Mrs. Rimell never filed for bankruptcy. See Respondents' Brief in Opposition at 10. They were forced into involuntary bankruptcy by Respondents.

2. Contrary to Respondents' assertion, Mr. Rimell has never stated, in deposition or elsewhere, that there were no agreements with the creditor banks to extend the terms of the

loans. See Respondents' Brief in Opposition at 10.

3. Contrary to Respondents' assertion, documentary evidence was presented to the Bankruptcy Court regarding the existence of these agreements. See, Respondents' Brief in Opposition at 10; App. to Pet. at A-50.

4. Contrary to Respondents' assertion, oral modifications of unambiguous guarantees do not violate Missouri's parol evidence rule. See, Respondents' Brief in Opposition at 11. It is textbook law that the parol evidence rule precludes the introduction of statements made prior to or contemporaneously with the execution of a complete written contract to vary the terms of such contract. Sol Abrahams & Son Construction Co. v. Osterholm, 136 S.W.2d 86 (Mo. Ct. App. 1940). Petitioners' defense on the loans is that Respondent banks modified the terms of the loans. The parol

evidence rule has nothing to do with modifications of contracts.

V. Conclusion.

For these various reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted, and this case be set for argument to determine if this Court should reverse the Bankruptcy Court's decision.

Respectfully submitted,

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